one to extract the following as the rule of law applied in this instance: *where a particular practice is specifically denied by a well-defined industry's official institute and is in fact not followed in assigning grade names, there are yet cases in which a court is justified in finding that such practice is recognizable as an operative usage of a grade name which may be applied in the interpretation of a contract.*

Defendant knows of no such rule of law; certainly this Court has never laid down such a rule; consequently, defendant urges that the decision of the District Court and the Court of Appeals is in error

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in many instances inferences drawn from an application of the Court's inferred definition of "No. 4 finish". For example, none of the witnesses ever testified that the plates in their delivered condition were not No. 4 finish, and an agent of the supplier certified that the delivered finish *was* No. 4; yet the Judge found as fact that the plates as delivered did not have No. 4 finish because their roughness exceeded 42 micro-inches and because they had pits. The Court and opposing counsel conducted the entire case under the *idée fixe* that a polish with 120 grit invariably produces a smoothness under 42 micro-inches and without pits. An expert witness testified to the contrary, and without contradiction; but he was ignored. This example shows why courts should not be allowed to meddle in such "fact finding" in opposition to definitions adopted by an industry's technical marketing institute. Grit polishing as presently practiced in the industry cannot be controlled to 2 one-millionths of an inch, or even to 40 one-millionths of an inch, regardless of how much lawyers or judges may think that it can.

There was uncontradicted expert testimony to this effect printed in the appendix of defendant's brief; and defendant's brief relied strongly on this testimony; but the Court of Appeals was satisfied to mention only the "evidence detailed in [the District Judge's] opinion"—of which there was none. If the decision stands, the industry, being unable to hold to the standard set by the Court, will either have to adopt new (i.e. unadjudicated) standards or, as in the case of the air traveler's baggage check, impose specific reservations in every sale of No. 4 finish plate: "This is not the No. 4 finish mentioned in *Arc & Gas Welder Associates, Inc.* v. *Green Fuel Economizer Co., Inc.*, 182 F. Supp. 648".

and should be reviewed and reversed on the merits by this Court in exercise of its supervisory jurisdiction over the lower courts involved.

In the Court of Appeals, the defendant insisted that the terms "No. 4 finish" and "No. 4 finish without pits, cracks and crevices" were *not* synonymous and contended for an interpretation of the contract which would require defendant to furnish plates of "No. 4 finish" (i.e. mill polished with 120 grit) and plaintiff to do the "final polish" to remove "pits, cracks or crevices". Relying on the distinction appearing in the specifications, defendant cited Maryland decisions as well as pre-Erie decisions of this Court, for the principle that even if there were such a usage as that found by the District Court, it was not operative because the parties had, by the contractual distinction, implied an intention to avoid its application. The Court of Appeals disposed of this contention as follows:

> "It is true that the parties to a contract may exclude from the agreement the application of a usage by contracting upon different terms, Restatement of Contract § 247; *Appleman* v. *Fisher*, 34 Md. 540 and *Applestein* v. *Royal Realty Corp.*, 181 Md. 171; but in the pending case the parties used terms which had a definite meaning in the industry and may not now be heard to say that they did not use the terms as the industry understood them." (See Appendix to this petition, p. 9, 10).

The quoted statement puts the "usage" in the class of *custom*, holding the parties to its effect without regard to any intention to be discovered in the agreement itself. It rests on the principle that "the parties may reject usage but custom is immutable". Note (1922) 22 Col. L. Rev. 741; Williston on Contracts (Ref. ed. 1936), § 649, 662.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the industry meaning of "No. 4 finish" was so definite as to prevent the parties from adopting a different understanding of that term.

2. In holding that the industry usage of the term "No. 4 finish" as found by the District Court was supported by evidence.

3. In failing to decide whether the District Court erroneously excluded, on the ground of privilege, cross examination which tended to prove that the plaintiff had admitted his obligation to provide final polishing under the original contract.

4. In holding that the defendant was not entitled to a credit on account of impairments to the mill finish which occurred while the stainless steel plates were being erected and welded by the plaintiff.

5. In failing to hold that the District Court was without jurisdiction to decide, as it did, that defendant had no rights against the Government, when the Government was not, and could not be made a party to the action.

REASONS FOR GRANTING CERTIORARI

1. The decision is in direct conflict with previous statements of the Supreme Court of the United States on the law of operative usages as applied to the interpretation of contracts.

(a) The United States Supreme Court has held that a usage, if it is to bind the parties, must be sufficiently uniform, certain and general to warrant a conclusion that the parties contracted with

reference to it. Nowhere has the Supreme Court or the courts of Maryland held that a usage "not ordinarily" applied will bind parties to a meaning not stipulated in the contract. *Federal Reserve Bank* v. *Malloy*, 264 U.S. 160, 170 (1924) (where the alleged usage lacked "certainty and uniformity"), citing *Oelricks* v. *Ford*, 23 How. 49, 61, 62 (1859) (a Maryland case) and *Foley & Woodside* v. *Mason & Son*, 6 Md. 37, 50 (1854), (usage must be "constant"). Accord: *Baltimore Baseball Club* v. *Pickett*, 78 Md. 375, 386, 28 Atl. 279, 280 (1894); *Mercantile Trust & Deposit Co.* v. *Rode*, 137 Md. 362, 370, 112 Atl. 574, 577 (1921); 3 Williston, Contracts (Rev. ed. 1936) 1901, § 661.

(b) The Supreme Court of the United States and the courts of Maryland have held that a trade usage, no matter how well established, cannot be permitted to nullify an implied intention of the parties to be bound by a different understanding. *Barnard* v. *Kellogg*, 10 Wall. 383 (1870); *Dewitt* v. *Berry*, 134 U.S. 306 (1890); *Foley & Woodside* v. *Mason & Son*, *supra*; *Murray* v. *Spencer*, 24 Md. 520 (1866); *Appleman* v. *Fisher*, 34 Md. 540 (1871); *Susquehanna Fertilizer* v. *White*, 66 Md. 444, 7 Atl. 802, 803 (1887); *Wathen* v. *Pearce*, 175 Md. 651, 3 A. 2d 486, 492 (1939). Accord: 3 Williston, Contracts (Rev. ed. 1936) 1894 note 1, § 656.

(c) Any trade usage which will supersede an implied intention to be bound by a different understanding must have the status of custom and be recognized as law. *United States* v. *American Tin Plate Co.*, 301 U.S. 402, 410 (1937). A decision of the Court of Appeals of the Fourth Circuit is to the same effect. *Jarka Corporation*

v. *Pennsylvania R. Co.*, 42 F. Supp. 371, 379 (D. Md. 1941), aff'd 130 F. 2d 804, 807 (C.C.A. 4th 1942). Since no one can suggest that the definition of No. 4 finish found by the District Court and approved by the Court of Appeals has previously entered the common law, or that it now enters as a result of gradual accretion of judicial recognition or long and uniform practice, its application according to the formula of the Court of Appeals must rest on judicial legislation.

2. The decision opens the door to the re-writing of contracts by the trial courts in any case where the contract has used an industry-adopted term which, standing alone, is wholly ambiguous—and this even where the industry has deliberately organized an agency to provide standards and has expressly denied the usage found by the Court. Such a situation will allow the District Courts to embellish any standard adopted by the organized industry, to expand it and to add to it. The Court of Appeals' error in holding such a usage to be operative without reference to the implied intention of the contracting parties illustrates the ease with which a court will fall into the trap of applying the rule followed by the District Court with the extreme results here suggested.

3. Defendant urges that where a well-defined industry has acted expressly to regulate the meaning of its grade names, the question is raised whether any meaning other than that adopted by the industry may in law be applied by the Court. The doctrine of operative usage, set out in the first point above, is to the effect that it cannot. If, however, the law is that the Court may ignore the "official" meaning and apply another based on its own understanding of "non-

official" witnesses, the way is open to regulation of industrial marketing practices—even production practices—by judicial interference.

4. The District Court's definition of "No. 4 finish" having entered the law (unless reversed by this Court), every sale using the term will carry the definition with it. If the Institute's Manual can be believed, the industry will not be able to support the burden.

5. The field here entered by the District Court is a good example of what may become accepted practice if this decision is allowed to stand. There is presented the distinct possibility that industry will find repeated necessity of adopting ever-changing standards in order to avoid the consequences of decisions made by poorly informed judges for *ad hoc* purposes. The desired standardization necessary to a complex and highly organized economy, which nevertheless prizes private initiative and free enterprise, may be put periodically in a state of confusion by judicial meddling. The only discernible alternative for the stainless steel industry will be to recognize two standards, i.e. "No. 4 finish" and "judicial No. 4 finish", but with resultant difficulties in marketing.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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